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Supreme Court, U.S.
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No. 97-547

In The

Supreme Court of the United States

October Term, 1996

JAN CASEY,

Petitioner,

vs.

ARIZONA MAIL ORDER,

Respondent,

INDUSTRIAL COMMISSION OF ARIZONA/LIBERTY MUTUAL INSURANCE COMPANY,

Respondent Party in Interest.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona Division Two

BRIEF IN OPPOSITION FOR RESPONDENTS ARIZONA MAIL ORDER AND LIBERTY MUTUAL INSURANCE COMPANY

DONALD L. CROSS
Counsel of Record
LISA M. ASHBROOK
CROSS & LIEBERMAN, P.A.
Attorneys for Respondents Arizona Mail Order and Liberty Mutual Insurance Company
2800 North Central Avenue
Suite 1725
Phoenix, Arizona 85004-1048
(602) 650-2856

72335 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondent Arizona Mail Order, Inc. is a privately held Arizona Corporation with no parent companies or nonwholly owned subsidiaries.

The following is the parent of Respondent Liberty Mutual Insurance Company: Liberty Mutual Group, Corp. There are no nonwholly owned subsidiaries of Respondent Liberty Mutual Insurance Company.

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STATEMENT OF THE CASE

This Petition seeks this Court's review of January 27, 1997 Memorandum Decision of the Arizona Court of Appeals, Division Two. The Arizona Supreme Court denied review of this matter on June 26, 1997. Petitioner claims that the Due Process Clause of the Fourteenth Amendment to the United States Constitution was violated when a worker's entitlement to compensation benefits awarded in a final decision of an Administrative Law Judge on an issue of compensability were thereafter inappropriately retroactively terminated. Additionally, where the award of the Industrial Commission vacated the termination and extended the time period of entitlement to benefits, there is a question as to whether this issue is moot. (Pet. i).

As detailed below, there is no basis or cause for this Court's review of this contention, a contention which has now been rejected by the Industrial Commission of Arizona, the Arizona Court of Appeals and the Supreme Court of Arizona. By substituting emotive verse about those "whose rights will likely be trampled upon" and the like (Pet. 11) for an accurate description of the underlying facts, the Petitioner has attempted to create the appearance a justiciable issue where none in fact exists.

Petitioner filed a claim for worker's compensation benefits for a gradual injury consisting of a work related aggravation of a pre-existing non-industrial chronic fatigue syndrome. Respondents denied the compensability of the claim. Following hearings, the Industrial Commission issued its Decision Upon Hearing and Findings and Award for Compensable Claim on October 11, 1994 (Pet. App. D) which found Respondents liable only for an aggravation of the pre-existing non-industrial condition. (Pet. App. D17-D18).

The only issue before him and decided by the Administrative Law Judge at the time the 1994 decision was issued was the compensability of the claim of injury, the "injury by accident" being defined as work related stress having caused an aggravation of the Petitioner's pre-existing, non-industrially related chronic fatigue condition. No findings were made as to whether the Petitioner's condition was stationary, the time periods of entitlement to medical and/or temporary compensation benefits, or whether the Petitioner was permanently impaired at the time of hearings and rendition of the decision.

After the Petitioner's claim was found compensable by the October 11, 1994 Decision Upon Hearing, it became the Respondents' responsibility to process and administer the Petitioner's claim in accordance with the Arizona Worker's Compensation Act (Title 23 of Arizona Revised Statutes). Respondents paid medical and temporary compensation benefits and by a Notice of Claim Status dated March 15, 1995, terminated Petitioner's active medical treatment without a permanent disability effective November 11, 1993, all pursuant to an evaluation conducted by Steven Strong, M.D. performed on that date.

The Petitioner filed a Request for Hearing on April 25, 1995 protesting the closure of her claim for benefits. Additionally, Petitioner filed a request for relief pursuant to A.R.S. § 23-1061(J) on April 25, 1995. The 1061(J) request demanded the Industrial Commission of Arizona set a hearing, "to examine the failure of the carrier herein to provide benefits as ordered by the final and *res judicata* decision of an Administrative Law Judge of the Industrial Commission of Arizona." (Pet. App. K).

Hearings were held on the issues presented and on May 20, 1996, the ALJ issued a Decision Upon Hearing and Findings

and Award for Temporary Disability Benefits. (Pet. App. C). Pursuant to this award the ALJ resolved a conflict in medical opinion and accepted the opinions and testimony of Dr. Strong as being the most probably correct and well founded. He concluded that the industrial aggravation of Petitioner's pre-existing chronic fatigue syndrome was at that time stationary. (Pet. App. C). This Decision Upon Hearing also extended the Petitioner's entitlement to active medical treatment and temporary disability compensation benefits for an additional two years through November 28, 1995, the date upon which Dr. Strong re-evaluated the Petitioner and concluded that her condition was stationary without permanent impairment with respect to any aggravation resulting from the stress of the work, the aggravative effects of same having ended at some point in time during the intervening four year time period between the date of injury and his second evaluation of the Petitioner.

Even though the Respondents initial attempt at closure was invalidated by the Industrial Commission and she had been granted two years of additional medical and compensation benefits, Petitioner was apparently not satisfied and filed a timely Petition for Special Action-Industrial Commission before Division Two of the Arizona Court of Appeals which resulted in the entry of a Memorandum Decision affirming the award below. (Pet. App. A). Petitioner then filed a timely Petition for Review in the Arizona Supreme Court. Review was denied by the Arizona Supreme Court on June 26, 1997. (Pet. App. B).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE INDUSTRIAL COMMISSION OF ARIZONA WHICH WAS AFFIRMED BY THE ARIZONA COURT OF APPEALS INVOLVES NEITHER A RETROACTIVE TERMINATION OF BENEFITS NOR ISSUES OF *RES JUDICATA* AND CONSEQUENTLY DOES NOT EVEN REMOTELY INFRINGE UPON THE DUE PROCESS RIGHTS OF THE PETITIONER.

Petitioner's contention that issues of *res judicata* or retroactive termination are triggered by the Industrial Commission award relating to compensability is wholly unfounded. What Petitioner fails to grasp is that the only issue decided by the Administrative Law Judge in the October 1994 decision was the compensability of her claim. No findings were made as to whether the Petitioner's condition had become stationary or whether the Petitioner was permanently impaired. Accordingly, the doctrines of *res judicata* or retroactive termination are not germane to this matter. The Petitioner cites numerous cases regarding the importance of the doctrine of *res judicata* and its failure to be applied. However, the Petitioner has failed to recognize that the Industrial Commission of Arizona, the Arizona Court of Appeals and the Supreme Court of Arizona have all found that *res judicata* was not applicable to the instant situation.

The Petitioner seems to think that the October 11, 1994 Decision Upon Hearing and Findings and Award for Compensable Claim automatically entitled her to lifetime benefits for her pre-existing non-industrial chronic fatigue syndrome. This is a greater entitlement than either factual reality

or the law dictate. The Decision Upon Hearing placed neither a minimum nor a maximum time limit on the Petitioner's need for active medical treatment. It was properly left to the Respondents to administer the Petitioner's claim after it was found to be compensable and to make the preliminary determinations as to when the medical evidence supported a conclusion that Petitioner's condition was stationary and whether there was any industrially related permanent impairment.

The Administrative Law Judge's 1994 compensability decision was neither a statement of nor did it in any way address the issues of the duration of active medical treatment, whether or not the Petitioner's condition was stationary, and if so, whether she had a permanent disability. None of those issues were before the Administrative Law Judge at the time of the litigation regarding the compensability of Petitioner's claim and accordingly, no decision regarding them was made. As such, after the finding of compensability became final, Respondents were completely within their rights to act to terminate benefits in a fashion and at a point in time they deemed appropriate based upon the evaluation of Dr. Strong.

Perhaps most significantly, ***Respondent's attempt at closure based upon Dr. Strong's initial evaluation, an evaluation which took place two (2) years after the claimed injury, was invalidated by the subsequent Decision Upon Hearing which Petitioner is now challenging***. As such, even if it were established that an issue ever existed as to an alleged retroactive termination, something which Respondents do not concede, this was resolved *in favor of the Petitioner* in the subsequent Decision Upon Hearing. Based upon the evidence presented at the closure issue round of hearings, the Respondent's initial termination was invalidated by the Administrative Law Judge, who awarded the Petitioner medical and temporary disability compensation benefits for an additional two years through November 28, 1995,

well past the date of the initial compensability decision. Consequently, Petitioner has based her entire Petition for Writ of Certiorari on a non-issue.

Respondents have reviewed every case cited by Petitioner in her Petition for Writ of Certiorari. Respondents do not consider any of these cases to be even remotely on point nor do any of them support the Petitioner's contention that the Industrial Commission Award in the instant case amounts to an unconstitutional taking of property. Any "retroactive termination" which was arguably attempted by the Respondents was subsequently invalidated by the Industrial Commission in its entirety.

Petitioner further cites what she deems to be "conflicting decisions" of other jurisdictions on these issues and claims a need for uniformity. Respondents are caused to wonder how uniformity is to be achieved in a situation in which each state is responsible for implementing and administrating its own worker's compensation system pursuant to the laws of each individual state. No two systems are exactly identical. A review of the cases cited by the Petitioner such as *Gusler v. Therview Tubulor Products*, 412 Mich. 270, 315 N.W. 2d 388 (1981) and *K & L Trucking Company v. Thurber*, 1 Va. App. 213, 337 S.E. 2d 299 (1985), reveals that these cases were decided based upon the specific law and procedures pertaining to each state's specific system. Further, none of these cases deal with the termination of benefits following entry of a litigated compensability decision, nor do they hold that *res judicata* is applicable in that instance.

Supreme Court jurisdiction in this instance is governed by 28 U.S.C. § 1257. That section describes the types of situations which may only be reviewed by the Supreme Court of the United States by Writ of Certiorari. It provides that final judgments rendered by the highest court of a state in which a decision can

be had, the validity of a treaty or statute of the United States, the validity of a state statute on the ground of its being repugnant to the constitution, treaties or laws of the United States, or any title, right, privilege or immunity especially set up or claimed under the constitution, treaty, statutes of or commission held or the authority exercised under the United States. Respondents submit that the issues presented to the Supreme Court by the Petitioner involve no such questions. Neither federal law nor the United States Constitution is called into question by Petitioner's Writ. Additionally, there is no argument on behalf of the Petitioner that the state statutes and rules governing worker's compensation proceedings are repugnant to the Constitution. Instead, Petitioner asserts that the carrier's conduct was inappropriate and unconstitutional. Again, this allegedly unconstitutional conduct on the part of Respondents was rejected and their action in terminating benefits was overturned by the Industrial Commission of Arizona.

Petitioner concludes her argument with an emotional plea that this Court do justice to a situation where constitutional rights have been denied by a state agency, the Industrial Commission of Arizona. Respondents must ask exactly what rights have been denied? Petitioner obtained a favorable compensability determination following litigation and then received approximately four years of active medical treatment and temporary compensation benefits before her claim was terminated based upon the recommendation of an examining physician. The only thing which the Petitioner has been denied is her self-created expectation of an entitlement to lifetime benefits, something which the Constitution neither promises nor supports.

II.

EVEN IF A LEGITIMATE ISSUE OF RETROACTIVE TERMINATION HAD EXISTED, THIS ISSUE WAS RENDERED MOOT BY THE DECISION OF THE INDUSTRIAL COMMISSION WHICH EXTENDED PETITIONER'S BENEFITS THROUGH THE DATE OF THE SECOND DECISION.

A moot case is one whose resolution will not alter the legal rights of the parties. Mootness is based on the proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413, 415 (1971). The inability of the federal judiciary "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Powell v. McCormack*, 395 U.S. 486, 496 n.7, 89 S. Ct. 1944, 1950 n.7, 23 L. Ed. 2d 491, 497 n.7 (1969).

Clearly, the issue presented to the Court cannot affect the rights of the Petitioner in this case. Even if this Court were to determine that the Respondents had engaged in inappropriate retroactive termination of benefits, this has already been remedied by the Industrial Commission's decision. Such a finding would not entitle the Petitioner to any additional benefits.

Petitioner further argues that this issue should be determined regardless of its alleged mootness because it involves an issue regarding a practice which is "capable of repetition yet evading review." Respondents acknowledge that this is one exception to the mootness doctrine, but consider it to be inapplicable to the instant situation. In order for an issue to fit within this exception, the situation must be one that is capable of repetition with respect

to the individual Petitioner. *Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969). The *Hall* case involved the Petitioners' challenge of Colorado's six month residency requirement before being allowed to vote. Petitioners moved to Colorado five months before a general election and filed suit. By the time this matter reached the Supreme Court, the issue was rendered moot because by that time Petitioners had satisfied the six month residency requirement. The Court found that this matter was capable of repetition only if the Petitioners moved out of Colorado and then attempted to move back. This was held to be too speculative to fall within the "capable of repetition" exception.

Similarly, the instant situation would only be capable of repetition with respect to the Petitioner if she ever suffered another industrial injury which was denied, litigated, deemed compensable, and then terminated as of a date prior to the compensation determination. Given the fact that the Petitioner has not worked in the five years since this industrial injury and has no apparent intention of returning to work, the likelihood of this every happening again is similarly too speculative.

Further, even if this situation were capable of repetition, it is not likely that it would evade review. Respondents draw the courts attention to *DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974). This matter involved a Plaintiff's challenge of a law school's admission policy. Pending the litigation, the Plaintiff was admitted and attended law school. By the time the matter reached the Supreme Court the Plaintiff finished law school, thereby rendering the challenge moot. The Supreme Court held that this situation was not capable of evading review since the law school's admission policies were unchanged and there was every reason to believe that any other person could attack the policy and come before the Court in the same manner. Similarly, the instant situation is not likely to evade review in the future.

CONCLUSION

Petitioner's constitutional challenge of the Industrial Commission's Award is both meritless and nonsensical. There was no retroactive termination in the instant case. Assuming *arguendo* that there were, it was nullified by the Industrial Commission's Decision Upon Hearing. Petitioner essentially received an Industrial Commission decision which was completely in her favor in terms of the issues she raises, yet she continues to challenge that award. Any potential basis for challenge, if present, was rendered moot by the Industrial Commission decision.

For the reasons given above, the Petition should be denied.

Respectfully submitted,

DONALD L. CROSS
Counsel of Record
LISA M. ASHBROOK
CROSS & LIEBERMAN, P.A.
Attorneys for Respondents
Arizona Mail Order and Liberty Mutual Insurance Company
2800 North Central Avenue
Suite 1725
Phoenix, Arizona 85004-1048
(602) 650-2856